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No. 665

IN THE

Supreme Court Of The United States

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC. - - - - Appellant

versus

COMMONWEALTH OF KENTUCKY - - Appellee

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

James E. Thornberry
1011 Kentucky Home Life Building
Louisville, Kentucky – 40202
Attorney for Appellant

LAWYERS PRINTING CO., LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1963

No._____

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC. - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

Appellant, Arlan's Department Store of Louisville, Inc., appeals from a final judgment (styled "Mandate" under Kentucky practice) of the Court of Appeals of Kentucky, the Court of last resort of the Commonwealth of Kentucky (Kentucky Constitution Section 109), which mandate was entered on May 3, 1963 and became effective June 28, 1963, upon Appellant's Petition for Rehearing being overruled on said date. The Judgment here appealed from sustained the validity of Kentucky Revised Statute 436.160 under both the Kentucky and United States Constitution, the constitutional attack by Appellant

being on grounds that the Statute in question is so vague and uncertain as to constitute a deprivation of due process under the Fourteenth Amendment of the Constitution of the United States.

It is to be noted that in prior litigation between the same parties the Statute in question was held constitutionally valid under the First Amendment of the Constitution of the United States. Opinions in this previous litigation are *Commonwealth of Kentucky* v. *Arlan's Department Store of Louisville,* Ky., 357 S.W. 2d 708, and *Arlan's Department Store of Louisville, Inc.* v. *Kentucky,* 371 U.S. 218, 9 L.Ed. 2d 264, 83 S.Ct. 277 (per curium opinion dismissing appeal for want of substantial federal question. Mr. Justice Douglas, dissenting).

Kentucky Revised Statute 436.160 contains Kentucky's version of the Sunday Closing Laws or Sunday Blue Laws.

OPINIONS BELOW

The Court of Appeals of Kentucky upon its original decision in this case rendered an opinion which is set forth in full as Appendix A hereto.

On Petition for Rehearing the Court of Appeals modified its original opinion on its face, such modification being limited to the last five literary paragraphs of the original opinion, which paragraphs were removed and replaced by three literary paragraphs which did not change the ultimate holding of the Court. This latter opinion is set forth in full in

Appendix B hereto with the three modified paragraphs set forth in bold face type in order to make apparent the nature of the modification. The Opinion set forth in Appendix B hereto is also officially reported as *Arlan's Department Store of Louisville* v. *Commonwealth of Kentucky,* Ky., 369 S.W. 2d 9.

Set out as Appendix C hereto is the unreported Opinion of the Honorable L. R. Curtis, Circuit Judge, Jefferson (Kentucky) Circuit Court, concurred in by Honorable Thomas J. Knight, Circuit Judge, same Court.

Appendix D hereto sets forth the Judgment (Mandate) of the Court of Appeals with regard to the case in question.

Appendix E hereto is the Order of the Kentucky Court of Appeals modifying its original Opinion and overruling the Appellant's Petition for Rehearing.

JURISDICTION

The proceeding here involved is the appeal of a criminal misdemeanor conviction against Appellant for violation of K.R.S. 436.160(1). The charge in question initially arose by citizen's warrant taken in the Criminal Division of Jefferson County Quarterly Court, a court of limited criminal and civil jurisdiction existing by virtue of Section 139 of the Kentucky Constitution. At a hearing held on June 15, 1960, in the said Jefferson Quarterly Court the Appellant was convicted of violation of the Statute aforesaid and was fined $20.00 and costs.

Appeal was taken from this conviction to Jefferson Circuit Court under the provisions of Sections 362 through 366 of the Criminal Code of Practice of Kentucky. It is to be noted that the Criminal Code of Practice of Kentucky was repealed and replaced by the Rules of Criminal Procedure effective January 1, 1963, the former provisions of the Criminal Code now being embodied with some changes as Rules 12.02 through 12.06 of the said Rules of Criminal Procedure. As provided in section 366 of the aforesaid Criminal Code of Practice, the conviction of Appellant then stood for trial de novo before the Jefferson Circuit Court.

Motion was made to the said Jefferson Circuit Court to dismiss the charge on the grounds that the Statute in question was repugnant to the Kentucky Constitution and to Amendment One of the Constitution of the United States. The Motion to Dismiss was sustained by the Jefferson Circuit Court on January 17, 1961. Appeal from this Judgment was taken by the Commonwealth pursuant to the provisions of Section 348 of the Criminal Code of Practice aforesaid. This appeal resulted in the Court of Appeals of Kentucky reversing the ruling of the Jefferson Circuit Court (as reported in *Commonwealth of Kentucky* v. *Arlan's Department Store of Louisville*, Ky., 357 S.W. 2d 708). This ruling of the Kentucky Court of Appeals was appealed to the Supreme Court of the United States (October Term 1962, Number 503) which appeal was dismissed by the per curiam opinion aforesaid.

It is at this point that the present appeal begins Upon receipt of the Mandate of the Supreme Court dismissing the former appeal, the Court of Appeals withdrew its stay on its Mandate in the premises on January 14, 1963, which Mandate restored the charge against the Appellant to the docket of the Jefferson Circuit Court for trial de novo. After certain proceedings as set out in detail in the Statement of the Case, supra, Appellant was convicted of violation of K.R.S. 436.160(1) by the Jefferson Circuit Court on February 19, 1963. Appellant thereupon filed Statement of Appeal in the Court of Appeals of Kentucky in conformity with rules of the Court of Appeals aforesaid Section 1.090(b). Simultaneously a Motion for Appeal was filed in the Court of Appeals aforesaid pursuant to K.R.S. 21.140(2).

Following proceedings in the Court of Appeals aforesaid, set out in detail in Statement of the Case, supra, opinion was rendered (Appendix B hereto) together with a Judgment (Mandate) (Appendix D hereto) on May 3, 1963. Appellant filed in said Court of Appeals a Petition for Rehearing, Modification or Extension pursuant to Sections 1.350 through 1.370 of the Rules of the Court of Appeals of Kentucky, which action stayed the effect of the mandate aforesaid pending disposition thereof. By Order of the Court of Appeals dated June 28, 1963 (Appendix D hereto) the initial opinion was modified on its face and Appellant's Petition for Rehearing was overruled.

Under date of September 9, 1963, Notice of Appeal of the case to the Supreme Court of the United States

was filed in the Court of Appeals of Kentucky, pursuant to the Rules of the Supreme Court, Sections 10(2) and 11(1). On November 1, 1963, Motion for enlargement of time for docketing the Appeal in the Supreme Court, pursuant to Rule 13-1 of the Rules of the Supreme Court of the United States was made to a Judge of the Court of Appeals of Kentucky and an extension to December 10, 1963, was granted on the same date (see attested copy of Order attached to record herein).

Appellant believes that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the provisions of 28 U.S.C. Section 1257(2).

Appellant believes that jurisdiction lies with the Supreme Court of the United States because of the fact that the Court of Appeals of Kentucky in determining that K.R.S. 436.160 was not unconstitutionally vague necessarily determined the constitutionality of said Statute under the Constitution of the United States, and that said determination is, therefore, reviewable by this Court.

Cases believed to sustain this Court's jurisdiction are: *Winters* v. *New York*, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665; *Conally* v. *General Construction Co.*, 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126; *Cramp* v. *Board of Public Instruction of Orange County, Florida*, 368 U.S. 283, 7 L.Ed. 2d 290, 82 S.Ct. 279; *Herndon* v. *Lowry*, 301 U.S. 242, 81 L.Ed. 1066, 57 S.Ct. 732; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618; *Musser* v. *Utah*, 333 U.S. 95, 92 L.Ed. 562,

68 S.Ct. 397; *Scull* v. *Virginia*, 359 U.S. 344, 3 L.Ed. 2d 865, 79 S.Ct. 838.

THE STATUTE INVOLVED

The Statute here involved is Kentucky Revised Statute 436.160, which may be found in Vol. III, Title XL, Chapter 436 (Entitled "Offenses Against Morality"), Page 57 (of said title) in the official Edition of said Statutes. K.R.S. 436.160 reads as follows:

> "(1) Any person who works on Sunday at his own or at any other occupation or employs any other person, in labor or other business, whether for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system, shall be fined not less than two dollars nor more than fifty dollars. The employment of every person employed in violation of this subsection shall be deemed a separate offense.
>
> "(2) Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one day in each seven.
>
> "(3) Subsection (1) of this section shall not apply to amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera.

"(4) Any person who holds any boxing or wrestling match or exhibition on Sunday shall be fined not less than ten dollars nor more than one hundred dollars.

"(5) Any person licensed to keep, or any person controlling, a billiard, pigeon-hole or pool table who permits any game to be played on it on Sunday shall be fined not less than twenty-five dollars nor more than sixty dollars, and forfeit his billiard, pigeon-hole or pool table license if he holds such a license.

"(6) Any person who hunts game, with a gun or dogs, on Sunday shall be fined not less than five dollars nor more than fifty dollars."

It is to be noted that only Section 1 of the Statute aforesaid was involved in the instant case, it being Appellant's contention throughout that the general exceptions contained in said subsection, particularly the exception for "work of necessity" were so vague and uncertain as to leave an ordinary person at a loss to determine in advance what type of action was permitted and what type forbidden by the Statute in question.

QUESTIONS PRESENTED

The following question is presented by this appeal:

Whether or not a Statute of the Commonwealth of Kentucky, known as Kentucky Revised Statute, Section 436.160, which section, inter alia, prohibits, with certain exceptions, work on Sunday, as en-

acted by the Legislature of Kentucky, and as construed by the Court of Appeals of Kentucky in their decision here under appeal and in previous decisions of said Court, is in violation of Amendment Fourteen, Section 1, of the Constitution of the United States.

It is the specific position of the Appellant that the said Statute, in providing that there shall be excepted from the criminal sanctions of subsection (1) of said statute "work of necessity", there being no definition or criterion of what constitutes a work of necessity either in the terms of the Statute itself or in the decisions of the Court of Appeals of Kentucky construing same, is so indefinite and uncertain as to constitute a denial of due process to all citizens of Kentucky affected thereby, including the Appellant herein, in violation of the provisions of the Constitution of the United States as aforesaid.

STATEMENT OF THE CASE

This appeal involves no dispute of facts. The sole question presented is whether or not the provisions of K.R.S. 436.160 are so vague, indefinite and uncertain that persons of ordinary intelligence who are subject to the penalties provided thereunder cannot understand the provisions thereof or reasonably determine what conduct is forbidden thereby and that said Statute is, therefore, void and unenforceable as a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States.

The Federal Constitutional question here presented was raised in the Court of first instance (the Jefferson Circuit Court) by Motion to Dismiss filed on behalf of Appellant on February 8, 1963, (See Record Page 6, paragraph numbered 3. The Motion to Dismiss aforesaid was overruled by the Court of first instance by Order dated February 15, 1963, supported by Opinion of the Jefferson Circuit Court which Opinion is set forth as Appendix C hereto and appears as a part of the Record herein, Page 8 through 10.

The question of the constitutionality of the Statute was passed on by the said Court of first instance as is shown by the following statement contained in the Opinion aforesaid which appears at the beginning of the third literary paragraph thereof (Record Page 9):

> "The question of the constitutionality of the Statute is now before us on one question and one question only, that is, are the words, (work of necessity) so vague and their meaning so indefinite and uncertain as to make the law invalid . . ."

Thereafter on February 19, 1963 the charge against the Appellant was tried in chief on stipulated facts without a jury (See Record Page 6 paragraph numbered 4), and appellant was found guilty of violating K.R.S. 436.160(1) and was fined the sum of $10.00 and cost and judgment thereon was entered (See Record Page 7, first literary paragraph on said page).

Following the conviction aforesaid, Appellant again raised the constitutional question by a Motion to set aside the previous Motion overruling Appellant's

Motion to Dismiss, and to set aside the Judgment aforesaid on the ground that the Court of first instance had erred as a matter of law (Record Page 7, paragraph numbered 5).

The Federal constitutional question was raised in the initial appeal to the Court of Appeals of Kentucky by Paragraph 7 of the Agreed Statement from the Jefferson Circuit Court filed together with Statement of Appeal (Record Page 1) and by Motion for Appeal, (Record Page 3) which were docketed in the Kentucky Court of Appeals by Order dated February 22, 1963, (Record Page 14). The question is raised in the Agreed Statement aforesaid by Paragraph numbered 7 thereof (Record Page 7) which reads in part as follows:

> "7. The points relied on by defendant (Appellant) for reversal herein are:
>
> A. The Court erred as a matter of law in overruling defendant's Motion to Dismiss;"

In the Court of Appeals of Kentucky the questions involved were fully briefed by Appellant, by Appellee and Amicus Curiae on behalf of Appellee (See Orders of Court of Appeals concerning filing of Briefs on Pages 16, 18, 19, 20 and 21 of the Record). Oral argument was granted by the Court of Appeals of Kentucky on April 19, 1963 (Record Page 17). That the Court of Appeals of Kentucky in determining that the Statute in question was not void for vagueness made its determination not only on the basis of Kentucky law and the Kentucky Constitution but also considered

the Federal law and the United States Constitution is shown by the references contained in both its initial Opinion and its final Opinion as modified to the case of *United States* v. *Capital Traction Co.*, supra (Record Page 24, and Record Page 40) and by its reference to the case of *Chicago and Northwestern R. Co.* v. *Dey*, 35 Fed. 866, 1 L.R.A. 744, 751 in both such Opinions Record Page 25, and Record Page 41) as well as by the following statement which appears in both Opinions:

> "We agree, of course, with the Appellant's position that if a law is so vague that the average reasonable man cannot intelligently choose in advance which course to follow, it is void, because such a law would illegally confer upon the Courts powers both arbitrary, legislative in character and ex post facto in effect." (Record Page 29 and Page 45).

Both in the Briefs to the Court of Appeals of Kentucky, which have been omitted from the record herein, and in the oral argument before said Court, the Supreme Court cases supportive of the void for vagueness rule were fully presented to the said Court and the determination by the Court of Appeals of Kentucky necessarily included consideration of the validity of the Kentucky Statute in question in the light of the Federal Constitution.

See also Appellant's Notice of Appeal to the Supreme Court of the United States Section III (Record Page 49).

THE QUESTION IS SUBSTANTIAL

The question presented throughout this case is directed at the essential validity of the State Statute here under attack. As construed in the Opinion of the Court of Appeals of Kentucky the Statute in question, via application of the "work of necessity" exemption, confers arbitrary power on the inferior courts of Kentucky vested with the duty of trying persons charged for violation of the Statute. Assuredly, under the Reported Opinion of the Court of Appeals of Kentucky, any person charged with violation of the Statute would be powerless to know in advance what the caprice of a magistrate before whom he might be hailed would be with regard to any given activity engaged in on Sunday.

Not only does the Final Opinion of the Court of Appeals of Kentucky fail to set forth any guide lines for the determination of what a work of necessity might be, but, as shown by the record, the Kentucky Court implicitedly admits its inability to set such guide lines. It will be noted that the original Opinion (Appendix A), as rendered, contained two definitions of work of necessity (which definitions were mutually contradictory) and that on petition for Rehearing and Modification, the Kentucky Court removed *both* definitions without attempting to supply any further criteria (See Appendix B). As a result the Opinion, in effect, leaves determination of the exception a matter of fiat to be determined arbitrarily by the various trial judges in the Commonwealth of Kentucky.

Clearly this Court is here presented with a most essential example of denial of due process under the Fourteenth Amendment of the United States Constitution.

As noted by the Court of Appeals of Kentucky in its Opinion, the question of vagueness as applied to the Kentucky Sunday Law had not previously been brought before the Court. Earlier Kentucky cases determined under the Statute in question where the "work of necessity" exemption was in issue provide no interpretative guide lines, but rather emphasize the impossibility of establishing such limits.

For example in the case of *McAfee* v. *Commonwealth*, 173 Ky. 83, 190 S.W. 671, 673, we find the following statement:

> "And so the question as to whether a particular work or business that is engaged in on Sunday is or is not a work of necessity is inevitably in many cases a matter of such doubt that it would not be possible for the Courts to lay down with reasonable fairness and accuracy the line that separates works of necessity from works that are not necessary."

Similarly in the very early case of *Commonwealth* v. *L. & N. R. R. Co.*, 80 Ky. 291, we find the following statement:

> "It is impossible, and certainly not practicable, to draw the line of distinction with certainty between works of necessity and such labor as falls within the denunciation of the Statute, and we are not disposed to venture so far as to attempt to place a limit to the *meaning* of the word

necessity when applied to the wants of man." (Emphasis the Court's).

The rule in cases such as the one here presented is well established in the decisions of this Court. It is perhaps best enunciated in *Conally* v. *General Construction Co.*, 269 U.S. 385, 70 L. Ed. 322, 45 S.Ct. 126, which quotes with approval the frequently cited statement from *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 19 Ann. Cas. 68, as follows:

> ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the Courts upon another."

Thereafter, in the *Conally* Opinion this Court said (269 U.S. at page 328):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with

> ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The foregoing salutary rule of law has never been departed from by this Court or by any State jurisdiction of which the writer is aware.

It is evident on the face of the Opinion of the Court of Appeals of Kentucky that it inexplicably violated its own reasoning in the conclusion which it reached in the instant case.

The amount of the fine involved in this case is small but the principle involved and the ramifications of the decision are large indeed. The question here presented vitally affects the liberty and property of great numbers of citizens of the Commonwealth of Kentucky. The question is substantial and of widespread public importance.

It is respectfully submitted that this Court should note probable jurisdiction and grant plenary consideration to the constitutional issue here involved.

Respectfully submitted,

JAMES E. THORNBERRY
1011 Kentucky Home Life Building
Louisville, Kentucky—40202
Attorney for Appellant

Unreported Opinion
Court of Appeals of Kentucky

APPENDIX A

Administrative Director
(Sunday Closing)
Rendered: May 3, 1963

COURT OF APPEALS OF KENTUCKY

Arlan's Department Store of Louisville — Appellant

v.

Commonwealth of Kentucky — Appellee

Appeal from Jefferson Circuit Court
Criminal Branch Second Division
Hon. L. R. Curtis, Judge

OPINION OF THE COURT BY JUDGE PALMORE AFFIRMING

On a previous appeal of this case we reversed a judgment of the Jefferson Circuit Court holding the Sunday closing law, KRS 436.160, unconstitutional. The particular grounds on which the validity of the law had been successfully challenged in the circuit court are discussed in *Commonwealth* v. *Arlan's Department Store of Louisville*, Ky. 1962, 357 S.W. 2d 708. The case was then tried on stipulated facts without a jury and resulted in a conviction, from which the defendant now appeals, contesting the statute on a new and different ground. Because of the importance of the question and the desirability of its early resolution we shall not consider the technical objection that in

this proceeding it is concluded by the "law of the case" principle.

The heart of the statute is contained in this sentence:

> "(1) Any person who works on Sunday at his own or at any other occupation or employes [sic] any other person, in labor or other business, for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, *work of necessity,* or charity or work required in the maintenance or operation of a public service or public utility plant or system shall be fined not less than two dollars nor more than fifty dollars." (Emphasis added.)

The stipulated facts are:

"The defendant, Arlan's Department Store of Louisville, Inc., has for the past three years conducted a retail department store in Jefferson County, Kentucky. Said store sells hundreds of items including items of clothing, jewelry, cameras, utensils, appliances, hardware, cosmetics, toys, food for consumption on and off the premises and sundries. Said defendant operated said store on Sunday, April 24, 1960, and sold items above referred to and also sold to a customer a plastic bag containing toy blocks on said date. The defendant in offering for sale to the public the merchandise above referred to, employed various cashiers and other sales personnel on said date."

The main issue now before us is whether by virtue of its "unless" clause, especially the exception of "work of necessity," the statute is so vague as to be unenforceable.

Unreported Opinion
Court of Appeals of Kentucky

As a general principle of law the "void for vagueness" rule is well-established. It was succinctly stated in *United States* v. *Capital Traction Company*, 1910, 34 App. D.C. 68, 19 Ann. Cas. 68, 70, as follows:

> "In a criminal statute the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise there would be lack of uniformity in its enforcement. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizens may act upon the one conception of its requirements and th courts upon another."

One of the supporting authorities mentioned in the *Capital Traction Company* opinion was the Kentucky case of *L. & N. Railroad Company* v. *Commonwealth*, 1896, 99 Ky. 132, 35 S.W. 129, 33 L.R.A. 209, 59 Am. St. Rep. 457, in which this court, citing Mr. Justice Brewer's observation that there was very little difference between a provision of the Chinese Penal Code prescribing a penalty for "improper conduct" and a

statute making it a criminal offense to charge more than a reasonable rate,[1] held void for uncertainty a statute declaring it an offense punishable by fine for a railroad corporation to charge "more than a just and reasonable rate," etc. In a later case, Sullivan v. Brawner, 1931, 237 Ky. 730, 36 S.W. 2d 364, 368, it was suggested that a criminal enactment so indefinitely phrased as to require conjecture in determining its meaning not only violates fundamental rights of individuals charged with disobeying it, but also delegates to the courts what the writer of that opinion considered to be a legislative function. On the other hand, it was pointed out in Bailey v. Commonwealth, 1930, 235 Ky. 173 30 SW ed [sic] 879,[2] "that a criminal law is not unconstitutional merely because it throws upon people the risk of rightly estimating a matter of degree which deals with fixed and actual, as distinguished from imaginary and unascertained, conditions." And in the recent case of *McDonald* v. *Commonwealth*, Ky. 1960, 331 S.W. 2d 716, implicitly acknowledging the influence of its public purpose,[3] we held that the statute making it an offense to contribute to the delinquency of a minor is not void for uncertainty. KRS 199.320 (1).

The law of the colonies to the time of the Revolution was 29 Charles II, c. 7 (1677), which provided in part that no person might do any worldly labor, business or work on Sunday except for "work of necessity and

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[1] *Chicago & Northwestern R. Co.* v. *Dey*, 1888, 35 Fed. 866, 1 LRA 744, 751.

[2] Upholding a 1912 penal statute (now KRS 338.120) requiring "suitable and proper" toilet facilities for female employes.

[3] KRS 446.080 provides that all statutes of this state shall be liberally construed with a view to promote their objects and that there shall be no difference in the construction of civil, penal and criminal statutes.

charity only.'"[4] The same exception has descended to and appears today in the Sunday closing laws of a number of the states.[5] "The effect of the phrase has been to give the courts a wide range of discretion in determining exceptions. But reasonable men can and do differ as to what is 'necessity.'"[6] In the long history of the statute this has been the issue the courts most frequently, and almost exclusively, have been called upon to decide. Probably because of the persuasive weight of public opinion, it has not often been suggested, until recently, that the Sunday closing laws are too vague for enforcement. That particular question has never been directly decided by this court, though on several occasions the meaning of "work of necessity" has been discussed incident to a determination of whether the specific activity involved in the case fell within that exception.[7]

In the few jurisdictions where the same or comparable phraseology has been tested against the "void for vagueness" rule the courts have divided. For

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[4] *McGowan* v. *Maryland*, 1960, 366 U. S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101.

[5] See the separate opinion of Mr. Justice Frankfurter in the *McGowan* case at 366 U.S. 459, 526, 6 L. Ed. 2d 418, 456, 81 S. Ct. 1153, 1189, and Appexdix [sic] II attached thereto. Chapter 375, §36, Acts of 1801 (Kentucky), provided that "no work or business shall be done or performed on the sabbath day, unless the ordinary household offices of daily necessity, or other work of necessity or charity." 2 Littell's Statute Law of Kentucky 480 (1810).

[6] Ibid., Opinion of Frankfurter, jr., [sic] footnoting a formidable selection of diametrically opposed opinions by various courts of last resort on the question of whether specific activities were works of "necessity."

[7] See *Gray* v. *Commonwealth*, 1916, 171 Ky. 269, 188 SW 354 (barbering not a work of necessity); *McAfee* v. *Commonwealth*, 1917, 173 Ky. 83, 190 SW 671 (operation of grocery not a work of necessity); *Capital Theater* v. *Commonwealth*, 1918, 178 Ky. 780, 199 SW 1076 (operation of a moving picture theater not a work of necessity); *Natural Gas Products* v. *Thurman*, 1924, 205 Ky. 100, 265 SW 475 (manufacturing of carbon black held to be a work of necessity).

example, in *Commonwealth* v. *The American Baseball Club*, 1927, 290 Pa. 136, 138 A. 497, 53 ALR 1027 ("works of necessity and charity"), *State of Iowa* v. *Linsig*, 1916, 178 Ia. 484, 159 N.W. 995 ("work of necessity or charity"), and *State of New Jersey* v. *Monteleone*, 1961, 36 N.J. 93, 175 A. 2d 207 ("works of necessity and charity"), the law was held not to be fatally uncertain. In *State* v. *Hill*, 1962, 189 Kan. 403, 369 P. 2d 365, and *Harvey* v. *Priest*, Mo. 1963, 365 S.W. 2d , statutes prohibiting Sunday sales of merchandise except for "drugs and medicines, provisions, or other articles of immediate necessity" were held too indefinite for enforcement.

Proceeding from abstract principles a logical cas can be made for either side of the proposition in issue. There are ample precedents which, at least by analogy support the appellant's position. Logic, however, is but one of the factors that enter into the complex process of jurisprudence. A legal theory is best defined by observation of how it is applied to actual fact situations. The way in which a principle has been applied in one type of case sometimes defies analogy with the way in which it has been applied in another. We are reminded again of Holmes' famous introductory passage: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

Holmes, *The Common Law*, p. 1.

Unreported Opinion
Court of Appeals of Kentucky

The process by which the Sunday closing statute has weathered the tests of time, enacted originally for religious purposes that would now be considered fatal to its constitutionality but later sustained as a legitimate exercise of the police powers of the state . . . based upon long experience and custom, proving that periods of rest from ordinary pursuits are requisite to the well-being, physically and mentally, as well as morally, of a people,'[9] provides graphic demonstration of Holmes' thesis.

Since we are called upon to assess the validity and effect of this law with due regard for "the manners, habits, wants and customs of the people it is to affect,"[10] it is appropriate that we take judicial notice of some of the pertinent facts of life. We are aware that the enforcement of the statute by criminal process has been spotty and sporadic, so much so that 28 years ago a most incisive analyst of the American socio political scene ventured to suggest that the so-called "blue laws" had appeared "to die a natural death without bothering anyone, even though they are not repealed."[11] Large numbers of people openly flout them with impunity. Yet we think a substantial majority observe them, by common custom and choice if not through respect for or fear of the enactment itself. Some who insist upon its enforcement are animated by considerations (e.g., limitation of business competition) quite foreign from its purposes, and many

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[9] *Strand Amusement Co.* v. *Commonwealth*, 1931, 241 Ky. 48, 43 SW 2d 321, 323.

[10] *Commonwealth* v. *L. & N. Railroad Co.*, 1882, 80 Ky. 291, 295, 3 LKR 788, 791, 44 Am. Rep. 475, 477.

[11] Thurman Arnold, *The Symbols of Government*, p. 160 (Yale University Press, 1935, reprinted in 1962 by Harcourt, Brace & World, Inc.).

who do not wish to abide by the law would not abolish it, but prefer (perhaps unconsciously) to retain it as a symbol of morality.[12] All of this, however, is but a natural phenomenon of government by the people, reflecting the ambivalence of human nature itself. That conflicting emotions may combine to keep a law on the books and at the same time chafe at or even prevent its enforcement does not justify the courts in disturbing it or in evading its application. Such conflicts are better brought to the floor of the legislature.

Heretofore this court always has taken for granted, but without having to decide specifically, that the term "work of necessity" is sufficiently understandable, within the context of the Sunday closing law, for practical application. We now formally confirm that viewpoint. Concededly, the language is loose. So is the conception of the "reasonable man," the most useful tool of Anglo-American law.[13] Though courts of last resort may differ in its application to a given state of facts, as is always the case with borderline questions, we regard as satisfactory this definition stated long ago in the case of *Commonwealth* v. *Nesbit*, 1859, 34 pa. 398, 409: "Necessity . . . can itself be only approximately defined. The law regards that as necessary, which the common sense of the country, in its ordinary modes of doing its business, regards as necessary."

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[12] Ibid., pp. 159, 160, wherein the author contributes this gen [sic]: "No way has yet been discovered of preventing moral attitudes from persisting long after they are in direct conflict with human behavior. Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continued our conduct, and unrepealed because we want to preserve our morals."

[13] "The law usually is what the average reasonable man thinks it ought to be." Drury, C., in *Bailey* v. *Farmers Bank of White Plains*, 1928, 227 Ky. 179, 12 SW 2d 312, 314.

We agree, of course, with the appellant's position that if a law is so vague that the average reasonable man cannot intelligently choose in advance which course to follow, it is void, because such a law would illegally confer upon the courts powers borth [sic] arbitrary, legislative in character, and ex post facto in effect. That also would be the practical effect if we should say, as was argued in this case, that what is a "work of necessity" is a jury question. Despite language in some of our cases which might give color to that viewpoint, we do not accept it. The question is one of law, to be decided in each instance by the court in which the case is being tried.[11] *Capital* Theater Co. vs. Commonwealth, 1918, 178 Ky. 780, 199 SW 1076, 1079. This is the only way in which the law can be (as it must be) the same in one local community as in another.

It follows that what has been said that if the term "work of necessity" be given a broad and liberal construction by the court, then its meaning will indeed be obscure, and by our own act we shall have invested the law with the very vice at which the "void for vagueness" rule is aimed. In one sense or another, everything can be said to be necessary, depending, perhaps, upon whether one believes in free will. We therefore hold that the word "necessity" does not embrace mass convenience or the avoidance of mass irritation. It is confined to activities of emergency to the individual or directly vital to the welfare of the public at large. It

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[11] If the facts are not in dispute, the question normally would be resolved on motion for a peremptory. Otherwise, it would arise at the instruction stage, at which time the court would be required to determine whether, under the evidence most favorable to the defendant, he is entitled to an instruction to the effect that if the jury believes the facts to be as thus shown, the defendant must be acquitted.

does not include the operation of a department store.

The stipulation contained sufficient evidence to show that the business being conducted by the appellant was not a work of necessity and did not come within any of the other exceptions set forth in KRS 436.160(1).

We take this occasion to repeat that the Sunday closing law is not of the court's making and is not within the court's legitimate authority or responsibility to modify or undo. If the specific exemptions enumerated in the statute need supplementation (as we believe they do), it is within the power of a mature people, and in the best tradition of a democratic society, to accomplish it through direct legislation.

The judgment is affirmed.

Attorney for Appellant:
James E. Thornberry, Louisville, Kentucky
(1011 Ky. Home Life Bldg.)

Attorney for Appellee
John B. Breckinridge, Atty. Gen.
Laurence E. Higgins, Comth's Atty.
Carl. C. Ousley, Jr., Asst. Comth's Atty.

Amicus Curiae—Charles E. Keller, Louisville, Ky.
(504 M. E. Taylor Bldg.)
Amicus Curiae—Oldham Clarke, Louisville, Ky.
(1112 Ky. Home Life Bldg.)

Reported Opinion
Court of Appeals of Kentucky

APPENDIX B

Rendered: May 3, 1963
Opinion Modified: June 28, 1963

COURT OF APPEALS OF KENTUCKY

Arlan's Department Store of Louisville — Appellant

v.

Commonwealth of Kentucky — Appellee

Appeal from Jefferson Circuit Court
Criminal Branch Second Division
Hon. L. R. Curtis, Judge

OPINION OF THE COURT BY JUDGE PALMORE

AFFIRMING

On a previous appeal of this case we reversed a judgment of the Jefferson Circuit Court holding the Sunday closing law, KRS 436.160, unconstitutional. The particular grounds on which the validity of the law had been successfully challenged in the circuit court are discussed in *Commonwealth* v. *Arlan's Department Store of Louisville*, Ky. 1962, 357 S.W. 2d 708. The case was then tried on stipulated facts without a jury and resulted in a conviction, from which the defendant now appeals, contesting the statute on a new and different ground. Because of the importance of the question and the desirability of its early resolution we shall not consider the technical objection that in this proceeding it is concluded by the "law of the case" principle.

Reported Opinion
Court of Appeals of Kentucky

The heart of the statute is contained in this sentence:

"(1) Any person who works on Sunday at his own or at any other occupation or employes any other person, in labor or other business, for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, *work of necessity*, or charity or work required in the maintenance or operation of a public service or public utility plant or system shall be fined not less than two dollars nor more than fifty dollars." (Emphasis added.)

The stipulated facts are:

"The defendant, Arlan's Department Store of Louisville, Inc., has for the past three years conducted a retail department store in Jefferson County, Kentucky. Said store sells hundreds of items including items of clothing, jewelry, cameras, utensils, appliances, hardware, cosmetics, toys, food for consumption on and off the premises and sundries. Said defendant operated said store on Sunday, April 24, 1960, and sold items above referred to and also sold to a customer a plastic bag containing toy blocks on said date. The defendant in offering for sale to the public the merchandise above referred to, employed various cashiers and other sales personnel on said date."

The main issue now before us is whether by virtue of its "unless" clause, especially the exception of "work of necessity," the statute is so vague as to be unenforceable.

As a general principle of law the "void for vagueness" rule is well-established. It was succinctly stated

in *United States* v. *Capital Traction Company*, 1910, 34 App. D.C. 68, 19 Ann. Cas. 68, 70, as follows:

> "In a criminal statute the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise there would be lack of uniformity in its enforcement. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizens may act upon the one conception of its requirements and the courts upon another."

One of the supporting authorities mentioned in the *Capital Traction Company* opinion was the Kentucky case of *L. & N. Railroad Company* v. *Commonwealth*, 1896, 99 Ky. 132, 35 S.W. 129, 33 L.R.A. 209, 59 Am. St. Rep. 457, in which this court, citing Mr. Justice Brewer's observation that there was very little difference between a provision of the Chinese Penal Code prescribing a penalty for "improper conduct" and a statute making it a criminal offense to charge more

than a reasonable rate,[1] held void for uncertainty a statute declaring it an offense punishable by fine for a railroad corporation to charge "more than a just and reasonable rate," etc. In a later case, Sullivan v. Brawner, 1931, 237 Ky. 730, 36 S.W. 2d 364, 368, it was suggested that a criminal enactment so indefinitely phrased as to require conjecture in determining its meaning not only violates fundamental rights of individuals charged with disobeying it, but also delegates to the courts what the writer of that opinion considered to be a legislative function. On the other hand, it was pointed out in Bailey v. Commonwealth, 1930, 235 Ky. 173 30 SW ed [sic] 879,[2] "that a criminal law is not unconstitutional merely because it throws upon people the risk of rightly estimating a matter of degree which deals with fixed and actual, as distinguished from imaginary and unascertained, conditions." And in the recent case of *McDonald v. Commonwealth*, Ky. 1960, 331 S.W. 2d 716, implicitly acknowledging the influence of its public purpose, we held that the statute making it an offense to contribute to the delinquency of a minor is not void for uncertainty. KRS 199.320 (1).[3]

The law of the colonies to the time of the Revolution was 29 Charles II, c. 7 (1677), which provided in part that no person might do any worldly labor, business or work on Sunday except for "work of necessity and

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[1] *Chicago & Northwestern R. Co. v. Dey*, 1888, 35 Fed. 866, 1 LRA 744, 751.

[2] Upholding a 1912 penal statute (now KRS 338.120) requiring "suitable and proper" toilet facilities for female employes.

[3] KRS 446.080 provides that all statutes of this state shall be liberally construed with a view to promote their objects and that there shall be no difference in the construction of civil, penal and criminal statutes.

charity only.'"[4] The same exception has descended to and appears today in the Sunday closing laws of a number of the states.[5] "The effect of the phrase has been to give the courts a wide range of discretion in determining exceptions. But reasonable men can and do differ as to what is 'necessity.'"[6] In the long history of the statute this has been the issue the courts most frequently, and almost exclusively, have been called upon to decide. Probably because of the persuasive weight of public opinion, it has not often been suggested, until recently, that the Sunday closing laws are too vague for enforcement. That particular question has never been directly decided by this court, though on several occasions the meaning of "work of necessity" has been discussed incident to a determination of whether the specific activity involved in the case fell within that exception.[7]

In the few jurisdictions where the same or comparable phraseology has been tested against the "void for vagueness" rule the courts have divided. For

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[4] *McGowan* v. *Maryland*, 1960, 366 U. S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101.

[5] See the separate opinion of Mr. Justice Frankfurter in the *McGowan* case at 366 U.S. 459, 526, 6 L. Ed. 2d 418, 456, 81 S. Ct. 1153, 1189, and Appexdix [sic] II attached thereto. Chapter 375, §36, Acts of 1801 (Kentucky), provided that "no work or business shall be done or performed on the sabbath day, unless the ordinary household offices of daily necessity, or other work of necessity or charity." 2 Littell's Statute Law of Kentucky 480 (1810).

[6] Ibid., Opinion of Frankfurter, jr., [sic] footnoting a formidable selection of diametrically opposed opinions by various courts of last resort on the question of whether specific activities were works of "necessity."

[7] See *Gray* v. *Commonwealth*, 1916, 171 Ky. 269, 188 SW 354 (barbering not a work of necessity); *McAfee* v. *Commonwealth*, 1917, 173 Ky. 83, 190 SW 671 (operation of grocery not a work of necessity); *Capital Theater* v. *Commonwealth*, 1918, 178 Ky. 780, 199 SW 1076 (operation of a moving picture theater not a work of necessity); *Natural Gas Products* v. *Thurman*, 1924, 205 Ky. 100, 265 SW 475 (manufacturing of carbon black held to be a work of necessity).

example, in *Commonwealth* v. *The American Baseball Club*, 1927, 290 Pa. 136, 138 A. 497, 53 ALR 1027 ("works of necessity and charity"), *State of Iowa* v. *Linsig*, 1916, 178 Ia. 484, 159 N.W. 995 ("work of necessity or charity"), and *State of New Jersey* v. *Monteleone*, 1961, 36 N.J. 93, 175 A. 2d 207 ("works of necessity and charity"), the law was held not to be fatally uncertain. In *State* v. *Hill*, 1962, 189 Kan. 403, 369 P. 2d 365, and *Harvey* v. *Priest*, Mo. 1963, 365 S.W. 2d , statutes prohibiting Sunday sales of merchandise except for "drugs and medicines, provisions, or other articles of immediate necessity" were held too indefinite for enforcement.

Proceeding from abstract principles a logical case can be made for either side of the proposition in issue. There are ample precedents which, at least by analogy, support the appellant's position. Logic, however, is but one of the factors that enter into the complex process of jurisprudence. A legal theory is best defined by observation of how it is applied to actual fact situations. The way in which a principle has been applied in one type of case sometimes defies analogy with the way in which it has been applied in another. We are reminded again of Holmes' famous introductory passage: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[3]

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[3] Holmes, *The Common Law*, p. 1.

Reported Opinion
Court of Appeals of Kentucky

The process by which the Sunday closing statute has weathered the tests of time, enacted originally for religious purposes that would now be considered fatal to its constitutionality but later sustained as a legitimate exercise of the police powers of the state . . . based upon long experience and custom, proving that periods of rest from ordinary pursuits are requisite to the well-being, physically and mentally, as well as morally, of a people,"[9] provides graphic demonstration of Holmes' thesis.

Since we are called upon to assess the validity and effect of this law with due regard for "the manners, habits, wants and customs of the people it is to affect,"[10] it is appropriate that we take judicial notice of some of the pertinent facts of life. We are aware that the enforcement of the statute by criminal process has been spotty and sporadic, so much so that 28 years ago a most incisive analyst of the American socio-political scene ventured to suggest that the so-called "blue laws" had appeared "to die a natural death without bothering anyone, even though they are not repealed."[11] Large numbers of people openly flout them with impunity. Yet we think a substantial majority observe them, by common custom and choice if not through respect for or fear of the enactment itself. Some who insist upon its enforcement are animated by considerations (e.g., limitation of business

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[10] *Commonwealth* v. *L. & N. Railroad Co.*, 1882, 80 Ky. 291, 295, 3 LKR 788, 791, 44 Am. Rep. 475, 477.

[11] Thurman Arnold, *The Symbols of Government*, p. 160 (Yale University Press, 1935, reprinted in 1962 by Harcourt, Brace & World, Inc.).

competition) quite foreign from its purpose, and many who do not wish to abide by the law would not abolish it, but prefer (perhaps unconsciously) to retain it as a symbol of morality.[12] All of this, however, is but a natural phenomenon of government by the people, reflecting the ambivalence of human nature itself. That conflicting emotions may combine to keep a law on the books and at the same time chafe at or even prevent its enforcement does not justify the courts in disturbing it or in evading its application. Such conflicts are better brought to the floor of the legislature.

Heretofore this court always has taken for granted, but without having to decide specifically, that the term "work of necessity" is sufficiently understandable, within the context of the Sunday closing law, for practical application. We now formally confirm that viewpoint. Concededly, the language is loose. So is the conception of the "reasonable man," the most useful tool of Anglo-American law.[13]

We agree, of course, with the appellant's position that if a law is so vague that the average reasonable man cannot intelligently choose in advance which course to follow, it is void, because such a law would illegally confer upon the courts powers both arbitrary, legislative in character, and ex post facto in effect.

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[12] Ibid., pp. 159, 160, wherein the author contributes this gen [sic]: "No way has yet been discovered of preventing moral attitudes from persisting long after they are in direct conflict with human behavior. Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continued our conduct, and unrepealed because we want to preserve our morals."

[13] "The law usually is what the average reasonable man thinks it ought to be." Drury, C., in *Bailey* v. *Farmers Bank of White Plains*, 1928, 221 Ky. 179, 12 SW 2d 312, 314.

Reported Opinion
Court of Appeals of Kentucky

That also would be the practical effect if we should say, as was argued in this case, that what is a "work of necessity" is a jury question. Despite language in some of our cases which might give color to that viewpoint, we do not accept it. The question is one of law, to be decided in each instance by the court in which the case is being tried.[11] Commonwealth v. London, 1912, 149 Ky. 372, 149 SW 852; Capital Theater Co. v. Commonwealth, 1918, 178 Ky. 780, 199 SW 1076, 1079. This is the only way in which the law can be (as it must be) the same in one local community as in another.

It is our opinion that the operation of the department store on Sunday is not necessary. The stipulation contained sufficient evidence to show that the business being conducted by the appellant was not a work of necessity and did not come within any of the other exceptions set forth in KRS 436.160(1).

The judgment is affirmed.

Attorney for Appellant:

James E. Thornberry, Louisville, Ky.
(1011 Ky. Home Life Bldg.)

Attorneys for Appellee:

John B. Breckinridge, Atty. Gen.
Laurence E. Higgins, Comth's Atty.
Carl C. Ousley, Jr., Asst. Comth's Atty.

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[11] If the court determines that the activity described in the charging instrument and proof is not a work of necessity, the jury may be instructed to the effect that if it believes beyond a reasonable doubt that the defendant did in fact engage in that activity on Sunday he should be found guilty.

Reported Opinion
Court of Appeals of Kentucky

Amicus Curiae—Charles E. Keller, Louisville, Ky.
(504 M. E. Taylor Bldg.)
Amicus Curiae—Oldham Clarke, Louisville, Ky.
(1112 Ky. Home Life Bldg.)

APPENDIX C

JEFFERSON CIRCUIT COURT
Criminal Branch, Second Division
No. 117745

Commonwealth of Kentucky — Plaintiff

v.

Arlan's Department Store
of Louisville, Inc. — Defendant

OPINION

This action is now before the Court on the motion of the defendant to declare KRS § 436.160 unconstitutional on the ground that the words "work of necessity," used therein, are so vague and uncertain as to make said statute so unenforceable as to render it void.

The pertinent points of said statute are as follows: "Any person who works on Sunday at his own or at any other occupation, or employs any other person in labor or any other business, whether for profit or amusement, unless his work, or the employment of others, is in the course of ordinary household duties, work of necessity or charity, or work required in the

maintenance or operation of a public service or public utility plant or system, shall be fined not less than Two Dollars nor more than Fifty Dollars. The employment of every person employed in violation of this subsection shall be deemed a separate offense."

The question of the constitutionality of the statute is now before us on one question and one question only, that is, are the words, "work of necessity" so vague and their meaning so indefinite and uncertain as to make the law invalid. Generally speaking, we think not. We cannot say in advance that the purchase of a loaf of bread, or a bottle of milk, or the sale of an automobile tire, or sales of many other articles on Sunday, would or would not be necessary. We can think of situations where the sale of food and other articles on Sunday would be a necessity, and we can think of situations where sales of such articles would not be a necessity on Sunday. It depends upon the facts in each particular case, and each case, as it arises, must be decided upon its own merits by judge or jury, according to the evidence, if any, then introduced.

We are aware of the fact that this will involve lots of litigation and inconvenience and uncertainty on the part of the people, but that will be necessary so long as the law is in force. No court in Kentucky has ever held this law to be unconstitutional on the ground relied upon by this defendant in this case, nor has any previous effort been made for any Kentucky court to so hold, and, so far as we know, this applies to similar statutes in other states. Perhaps our Legislature by popular legislation will remedy this situation at some future time. At least, we hope so.

Motion of the defendant is overruled.

Unreported Opinion
Jefferson Circuit Court

As similar cases now pending might be assigned to the First Division of the Jefferson Circuit Court, Criminal Branch, over which Judge Knight presides, he consented to hear the argument in the case and read the splendid briefs submitted by both sides. He concurs in this opinion.
Feb. 15/63

/s/ L. R. CURTIS
Judge
/s/ THOMAS J. KNIGHT
Judge

APPENDIX D

ORDERS—Kentucky Court of Appeals
Spring Term, May 3, 1963

Arlan's Department Store of
Louisville, Inc. - - - - Appellant

vs.

Commonwealth of Kentucky - - - Appellee

Appeal from a judgment of the Jefferson Circuit Court
Criminal Branch—Second Division

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant, its cost herein expended.

APPENDIX E

ORDERS—Kentucky Court of Appeals
Spring Term, June 28, 1963

Arlan's Department Store of Louisville, Inc.
vs.
Commonwealth Jefferson

The Court being sufficiently advised, the opinion delivered herein is modified on its face, and it is considered that the appellant's petition for rehearing be and the same is hereby overruled.

PROOF OF SERVICE

I, James E. Thornberry, attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of December, 1963, I served copies of this Jurisdictional Statement on the several parties set out below, by mailing to each of them, in a duly addressed envelope, with postage prepaid, a copy hereof, as follows:

Honorable John B. Breckenridge
Attorney General
Commonwealth of Kentucky
Frankfort, Kentucky

Honorable Laurence E. Higgins
Commonwealth Attorney
Jefferson County, Kentucky
Court House
Louisville, Kentucky—40202

Charles E. Keller, Esq.
Amicus Curiae
Marion E. Taylor Building
Louisville, Kentucky—40202

Oldham Clarke, Esq.
Amicus Curiae
Kentucky Home Life Building
Louisville, Kentucky—40202

The giving of notice to amicus curiae aforesaid shall not be deemed a consent to their participation under Rule 42 of this Court.

James E. Thornberry
1011 Kentucky Home Life Building
Louisville, Kentucky—40202

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IN THE

SUPREME COURT OF THE UNITED STATES

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC. . . . . Appellant

versus

COMMONWEALTH OF KENTUCKY . . . Appellee

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND BRIEF

On Behalf of Appellee

ROBERT MATTHEWS
Attorney General

ROBERT L. MONTAGUE III
Assistant Attorney General

HOLLAND N. McTYEIRE
Assistant Attorney General

COUNSEL FOR APPELLEE
State Capitol Building
Frankfort, Kentucky

January 7, 1964

ROBERTS PRINTING CO., FRANKFORT, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1963

ARLAN'S DEPARTMENT STORE
OF LOUISVILLE, INC. - - - - - - *Appellant*

vs.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND BRIEF

Motion to Dismiss

Appellee, Commonwealth of Kentucky, moves the Court to dismiss the appeal upon the ground it does not present a substantial federal question, in that the question has been settled by prior decisions of this Court [Rule 16, 1(b)].

The Question: The constitutionality of Kentucky's Sunday Closing Law (KRS 436.160).

Brief in Support of Motion

Where the constitutional question sought to be appealed has previously been ruled upon by this Court, the appeal has been dismissed upon the ground that the constitutional question presented is not substantial in character.

Zucht v. King,
260 U.S. 174, 176; 67 L. Ed. 194, 198; 43 S. Ct. 24 (1922)

See Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929; 44 H.L.R. 1, 12-14 (1930)

Frankfurter & Hart, The Business of the Supreme Court at October Term, 1932; 47 H.L.R. 245, 260 (1933)

Stern & Gressman, Supreme Court Practice, pp. 214, 215 (1950)

The question as to the constitutionality of the Sunday Closing Laws of three states was at one time decided by this Court in four recent cases.

McGowan v. Maryland,
366 U.S. 420, 6 L. Ed. 2d 393, 81 S.Ct. 1101 (Md.)

Gallagher v. Crown Kosher Super Market,
366 U.S. 617, 6 L. Ed. 2d 536, 81 S. Ct. 1122 (Mass.)

Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 6 L. Ed. 2d 551, 81 S.Ct. 1135 (Penn.)

Braunfeld v. Brown,
366 U.S. 599, 6 L. Ed. 2d 563, 81 S.Ct. 1144 (Penn.)

Like the laws of Maryland, Massachusetts and Pennsylvania, Kentucky's law provides a penalty for,

> "Any person who works on Sunday . . . or employs any other person. . . . " [KRS 436.160(1)]

The Kentucky statute excepts from its operation "ordinary household duties, *work of necessity or charity*" [KRS 436.160(1)] and "amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera" [KRS 436.160(3)] (Emphasis added.)

The Kentucky law has been upheld by the Kentucky Court of Appeals in a long line of decisions, the last of which is the case at bar.

> The Commonwealth v. The Louisville and Nashville Railroad Co., 80 Ky. 291 (1882)
>
> Capital Theater Co. v. Commonwealth, 178 Ky. 780, 199 S.W. 1076 (1918)
>
> Strand Amusement Co. v. Commonwealth, 241 Ky. 48, 43 S.W. 2d 321 (1931)
>
> Commonwealth v. Phoenix Amusement Co., Inc., 241 Ky. 678, 44 S.W. 2d 830 (1931)
>
> City of Harlan v. Scott, et al., 290 Ky. 585, 162 S.W. 2d 8 (1942)
>
> Commonwealth v. Arlan's Dept. Store of Louisville, et al., Ky., 357 S.W. 2d 708 (1962)
>
> Arlan's Department Store of Louisville v. Commonwealth, Ky., 369 S.W. 2d 9 (1963)

There is nothing in the majority opinions of the McGowan, Gallagher, Two Guys or Braunfeld cases, supra, that indicates a Sunday statute which includes an exception for works of necessity is unconstitutional. Those opinions, on the contrary, face this issue and are all consistent with the constitutionality of the Kentucky

statute. We therefore cite them as dispositive of the question here involved.

See particularly McGowan v. Maryland, supra, wherein the Court indicates at p. 422 of 366 U. S. and p. 397 of 6 L. Ed 2d "The questions presented are * * * whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process * * * ."

The Court in this Case was considering statutory language substantially identical to that involved in this appeal, since Sec. 492 of Md. Ann. Code, Art. 27, excepts all work of necessity and charity. See McGowan v. Maryland, supra, at p. 423 of 366 U.S., 397 of 6 L. Ed. 2d.

CONCLUSION

We submit therefore that this Court by its decisions in the McGowan, Gallagher, Two Guys and Braunfeld cases, supra, heretofore has decided the constitutionality of the equivalent of Kentucky's Sunday Closing Law and that appellant's appeal should be dismissed because it thereby does not present a substantial federal question.

Respectfully submitted,

ROBERT MATTHEWS
Attorney General

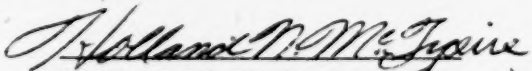
ROBERT L. MONTAGUE III
Assistant Attorney General

HOLLAND N. MCTYEIRE
Assistant Attorney General

COUNSEL FOR APPELLEE
COMMONWEALTH OF KENTUCKY
State Capitol Building
Frankfort, Kentucky

PROOF OF SERVICE

I, Holland N. McTyeire, one of the attorneys for Commonwealth of Kentucky, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of January, 1964, I served copies of the foregoing Motion to Dismiss and Brief on the appellant herein by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorney of record as follows: To James E. Thornberry, Esq., 1011 Kentucky Home Life Building, Louisville 2, Kentucky, attorney for Arlan's Department Store of Louisville, Inc.



Holland N. McTyeire
Assistant Attorney General
Commonwealth of Kentucky
State Capitol Building
Frankfort, Kentucky

ATTORNEY FOR APPELLEE